Teras Kimia Sdn Bhd v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCC-1–05 OF 2012
NALLINI PATHMANATHAN J
18 MARCH 2013

Contract — Breach — Damages — Quantum meruit — Plaintiff's claim for work done — Contract for supply of fuel markers — Negotiations for new contract carried out upon expiry of contract for services — Services continued to be rendered and accepted in interim period — Whether plaintiff entitled to recover reasonable compensation for services rendered during interim period — Contracts Act 1950 s 71

Contract — Formation — Implied term — Contract for supply of fuel markers — Negotiations for new contract carried out upon expiry of contract for services — Services continued to be rendered and accepted in interim period — Whether net effect of acts, words and conduct of the parties such that legally binding agreement arose during interim period — Phrase 'without commitment' used — Whether absence of terms as to pricing of services rendered contract void — Whether defendant estopped from denying existence of legally binding contract

Contract — Terms — Implied terms — Waiver of payment — Whether term may be implied into commercial contract that services to be rendered without any fee

The plaintiff and the defendant had entered into an agreement ('the original agreement') whereby the defendant appointed the plaintiff to provide the services of supplying Nanotag proprietary fuel markers pursuant to the plaintiff's NanoTag Program to mark subsidised fuel and for other related services. The original agreement was for a term of five years which expired on 31 March 2011. After the expiry of the original agreement the plaintiff, pursuant to a series of correspondence between the parties continued to provide the services as described under the original agreement to the defendant, notwithstanding the expiry of the original agreement. Such services were provided for a period from 31 March 2011 to 31 October 2011 ('the interim period'). The defendant accepted the plaintiff's services during the interim period. During the interim period negotiations were conducted for a new agreement on terms similar to the original agreement. However, eventually no new contract was awarded. The plaintiff was not paid for its services during the interim period. The plaintiff thus filed this claim against the defendant for breach of contract, or alternatively for work done on a *quantum meruit* basis.

The plaintiff maintained that it was implicit at all times that it was to be fully remunerated on terms identical to the original contract for the provision of such services during the interim period. The defendant however contended that due to the use of the words without commitment in the plaintiff's letter of offer for the interim period, it was understood that the services during the interim period were to be provided by the plaintiff entirely without charge. The issues which arose were: (i) whether the net effect of the acts, words and conduct of the parties was such that it may be construed that there subsisted a legally binding agreement for the supply of the services as that contained in the original agreement, during the tenure of the interim period; (ii) whether the defendant was estopped from denying the subsistence of such a legally binding agreement during the interim period; (iii) Whether the plaintiff was entitled to recover reasonable compensation for the services rendered during the interim period on the basis of *quantum meruit*.

Held:

(1) The question of whether a binding contract subsists between the parties depends, in law, on a consideration of the communications between the parties, both by word or conduct. It then falls to be considered whether such words and conduct, when considered in their entirety on an objective basis, can give rise to a conclusion that the parties had intended to create legal relations, and agreed upon the terms which the law regards as being essential for the formation of legally binding relations (see paras 51 & 62).

(2) On 31 March 2011 the plaintiff wrote to the defendant offering to carry on with the services it provided under the original contract (notwithstanding the expiry of the same) without commitment on the part of the defendant for a period of two months until 31 May 2011. This amounted to an offer. The defendant did not respond to this letter but acquiesced to, and participated in the execution of the further services provided by the plaintiff. Services were rendered for a term of seven months thereafter in total without any objection or demur from the defendant. During this time the parties embarked on a series of negotiations for a fresh contract. The only reasonable inference to be drawn from the facts was that the defendant accepted the plaintiff's offer for the continued provision of services during the interim period (see para 62(c)).

(3) In the absence of any clear waiver of charge, it is difficult to imply into a commercial contract of this magnitude that the executed services were agreed between the parties to be conducted entirely without any fee (see para 63(g)).

(4) There was, during the interim period a valid contract subsisting between the plaintiff and the defendant on terms substantively similar to that of the original contract (see para 64).

(5) The fact that no pricing was agreed between the parties did not render the contract void because the cost of providing the services may be implied into the contract that subsisted between them. Such a term may be implied because of the terms set out in the original contract. As the services provided by the plaintiff were identical in nature to that in the original contract it follows that the remuneration should be the same, and that such a term may be implied (see para 64).

(6) The fact that the plaintiff undertook to provide the services 'without obligation' did not translate to an agreement to undertake the word with no payment whatsoever. It would be a perverse construction of the letter of 31 March 2011 to conclude that the plaintiff was offering its services for free. It was an entirely untenable construction to adopt (see para 65).

(7) The defendant was estopped from denying that a legally binding contract came into play in during the interim period, as may be construed from the correspondence between the parties and more significantly, their conduct (see para 80).

(8) As the four conditions necessary to fall within the ambit of s 71 of the Contracts Act 1950 were fulfilled, plaintiff was entitled to compensation from the defendant for the services provided. The quantum of reasonable compensation is calculated by reference to the value of the services (see paras 92 & 97).

[Bahasa Malaysia summary

Plaintif dan defendan memasuki perjanjian ('perjanjian asal') yang mana defendan melantik plaintif untuk menyediakan perkhidmatan membekalkan penanda bahan api proprietari Nanotag berikutan kepada Program NanoTag plaintif untuk menandakan bahan api subsidi Program dan untuk khidmat berkaitan yang lain. Perjanjian asal adalah untuk terma lima tahun yang tamat pada 31 Mac 2011. Selepas tamatnya tempoh perjanjian asal, plaintif berikutan surat menyurat yang berturut-turut antara pihak-pihak terus menyediakan perkhidmatan seperti yang dinyatakan di bawah perjanjian asal kepada defendan, meskipun tamat tempoh perjanjian asal. Khidmat sedemikan diberikan untuk tempoh daripada 31 Mac 2011 hingga 31 Oktober 2011 ('tempoh sementara'). Defendan menerima perkhidmatan plaintif semasa tempoh sementara tersebut. Semasa tempoh sementara tersebut perundingan dijalankan untuk perjanjian baru atas terma yang sama kepada perjanjian asal. Walau bagaimanapun, akhirnya tiada kontrak baru diawardkan. Plaintif tidak dibayar untuk perkhidmatannya semasa tempoh sementara tersebut. Oleh itu plaintif memfailkan tuntutan ini terhadap defendan untuk kemungkiran kontrak, atau secara alternatif untuk kerja yang

dilakukan atas asas *quantum meruit*. Plaintif mengekalkan bahawa ia adalah tersirat pada kesemua masa bahawa ia mesti dibayar sepenuhnya atas terma yang sama kepada kontrak asal untuk peruntukan perkhidmatan sedemikian semasa tempoh sementara. Defendan walau bagaimanapun berhujah bahawa akibat penggunaan perkataan-perkataan 'without commitment' di dalam surat tawaran plaintif untuk tempoh sementara, ia difahamkan bahawa perkhidmatan semasa tempoh sementara diberikan oleh plaintif keseluruhannya tanpa bayaran. Isu-isu yang berbangkit adalah: (i) sama ada kesan akhir tindakan-tindakan tersebut, perkataan-perkataan dan tingkah laku pihak-pihak adalah seperti boleh ditafsirkan bahawa wujud perjanjian yang mengikat dari segi undang-undang untuk membekalkan perkhidmatan seperti yang terdapat di dalam perjanjian asal, semasa sepanjang tempoh sementara; (ii) sama ada defendan diestop daripada menafikan wujud perjanjian mengikat dari segi undang-undang sedemikian semasa tempoh sementara; (iii) sama ada plaintif berhak untuk mendapatkan balik pampasan munasabah untuk perkhidmatan yang diberikan semasa tempoh sementara atas asas *quantum meruit*.

Diputuskan:

(1) Persoalan sama ada kontrak mengikat wujud antara pihak-pihak bergantung, dari segi undang-undang, atas pertimbangan komunikasi antara pihak-pihak, kedua-duanya oleh perkataan atau tingkah laku. Ia kemudiannya akan dipertimbangkan sama ada perkataan dan tingkah laku sedemikian, apabila dipertimbangkan dalam keseluruhan atas asas objektif, boleh membangkitkan kepada kesimpulan bahawa pihak-pihak berniat untuk membentuk hubungan undang-undang, dan bersetuju ke atas terma-terma yang mana undang-undang menganggap sebagai penting untuk pembentukan hubungan mengikat dari segi undang-undang (lihat perenggan 51 & 62).

(2) Pada 31 Mac 2011 plaintif menulis kepada defendan menawarkan untuk menjalankan dengan perkhidmatan yang diberikannya di bawah kontrak asal (meskipun tamat tempohnya) tanpa komitmen oleh defendan untuk tempoh dua bulan sehingga 31 Mei 2011. Ini merupakan tawaran. Defendan tidak menjawab kepada surat ini tetapi bersetuju kepada, dan menyertai dalam pelaksanaan khidmat selanjutnya yang diberikan oleh plaintif. Khidmat diberikan untuk selama tujuh bulan kemudiannya tiada bantahan atau halangan daripada defendan. Pada masa ini pihak-pihak memulakan perundingan berturut-turut untuk kontrak baru. Satu-satu inferens munasabah yang boleh diambil daripada fakta adalah bahawa defendan menerima tawaran plaintif untuk peruntukan berterusan berkhidmat semasa tempoh interim tersebut (lihat perenggan 62(c)).

(3) Dalam ketiadaan apa-apa pelepasan bayaran yang jelas, adalah sukar

untuk membayangkan di dalam kontrak komersial yang sebesar ini bahawa perkhidmatan yang dilaksanakan adalah dipersetujui antara pihak-pihak untuk dijalankan keseluruhannya tanpa apa-apa bayaran (lihat perenggan 63(g)).

(4) Terdapat, semasa tempoh interim kontrak yang sah yang wujud antara plaintif dan defendan secara substantif sama seperti kontrak asal (lihat perenggan 64).

(5) Fakta bahawa tiada harga yang dipersetujui antara pihak-pihak tidak menyebabkan kontrak tak sah kerana kos menyediakan perkhidmatan tersebut boleh disirat di dalam kontrak yang wujud antara mereka. Terma sedemikian boleh disiratkan kerana terma-terma yang ditetapkan di dalam kontrak asal. Memandangkan perkhidmatan yang diberikan oleh plaintif adalah sama sifatnya seperti di dalam kontrak asal oleh itu bayaran sepatutnya sama, dan bahawa terma sedemikian boleh disirat (lihat perenggan 64).

(6) Fakta bahawa plaintif berjanji untuk memberikan khidmat 'without obligation' tidak ditafsirkan kepada perjanjian untuk mengambil perkataan tanpa apa-apa bayaran. Ia akan menjadi tafsiran bantahan surat 31 Mac 2011 untuk memutuskan bahawa plaintif menawarkan perkhidmatannya tanpa bayaran. Ia adalah tafsiran yang tidak dapat dipertahankan untuk diterima pakai (lihat perenggan 65).

(7) Defendan diestop daripada menafikan bahawa kontrak mengikat dari segi undang-undang wujud semasa tempoh sementara, seperti yang boleh ditafsirkan daripada surat menyurat antara pihak-pihak dan lebih nyata sekali, tingkah laku mereka (lihat perenggan 80).

(8) Memandangkan keempat-empat syarat yang perlu terangkum dalam lingkungan s 71 Akta Kontrak 1950 dipenuhi, plaintif berhak kepada bayaran daripada defendan untuk khidmat yang diberikan. Kuantum bayaran munasabah dikira dengan rujukan kepada nilai perkhidmatan (lihat perenggan 92 & 97).]

Notes

For a case on implied term, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4697.

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3206–3251.

For cases on implied terms, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6655–6608.

Cases referred to

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, QBD (refd)

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331, FC (refd)

British Steel Corp v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504, QBD (refd)

Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746, CA (refd)

Hillas & Co, Ltd v Arcos, Ltd [1932] All ER Rep 494, HL (refd)

RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] 3 All ER 1, SC (distd)

Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)

Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 547, CA (consd)

Trentham (G Percy) Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25, CA (refd)

Legislation referred to

Contracts Act 1950 s 71

Siew Yew Ming (Harmjeet Singh and Chan Mun Fei with her) (Raja Eleena Siew Ang & Associates) for the plaintiff.

Mohd Radhi Abas (Khairul Fazly Kamarudin with him) (Federal Counsel, Attorney General's Chambers) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiff is a company which was, at all material times, a licensee for technology relating to a specialised fuel marker known as the NanoTag, which is used, inter alia, for the marking of subsidised diesel for the purposes of carrying out inspections to detect cases of abuse of subsidised diesel. The plaintiff's claim against the defendant, the Government of Malaysia, is premised on breach of contract, or alternatively for work done on a quantum meruit basis, for which it claims it remains unpaid.

[2] The background relating to the dispute arose as follows. On 21 September 2006 the plaintiff and the Government of Malaysia entered into an agreement ('the original agreement') whereby the defendant appointed the plaintiff to provide the services of supplying NanoTag proprietary fuel markers pursuant to the plaintiff's NanoTag Program to mark subsidised fuel and for other related services. The plaintiff's program was important in the defendant's efforts to control the widespread abuse of subsidised diesel which had caused significant losses to the defendant.

[3] The original agreement was for a term of five years which expired on 31 March 2011. It was fully performed by the plaintiff and the plaintiff received the full contract price for the term of the contract. This is not in dispute.

[4] After the expiry of the original agreement the plaintiff, pursuant to a series of correspondence between the parties continued to provide the services as described under the original agreement to the defendant, notwithstanding the expiry of the original agreement. Such services were provided for a period from 31 March–31 October 2011, ie a period of about seven months ('the interim period'). The defendant accepted the plaintiff's services during the interim period.

[5] During the interim period negotiations were conducted between the defendant and, inter alia, the plaintiff, for a fresh or new agreement on terms similar to the original agreement. Other parties were also invited to participate in or to submit tenders for consideration. Eventually, no new contract was awarded to any of the parties, including the plaintiff.

[6] The plaintiff was not paid for its services during the interim period. This is primarily because of a dispute as to the construction to be placed on the correspondence between the parties upon the expiry of the original contract. In this context, the plaintiff maintains that it offered to continue to provide services to the defendant notwithstanding that the original contract had expired and that a new contract was being negotiated. The plaintiff further maintains that it was implicit at all times that it was to be fully remunerated on terms identical to the original contract for the provision of such services.

[7] The defendant on the other hand however, maintains that by reason primarily of the use of the words 'without commitment' in the plaintiff's letter of offer, it is understood that such services were to be provided by the plaintiff entirely without charge. In other words, the defendant understood from the offer that the plaintiff was providing its services free of charge. The defendant insists that it only accepted the plaintiff's offer on those terms, namely that there would be no charge incurred.

[8] The defendant points to the fact that the original agreement had expired on 31 March 2011 and that no agreement was ever reached between the parties to extend the agreement. Neither was any fresh contract entered into between the parties for the interim period and no interim rate of payment was also agreed upon. As such the defendant maintains that upon expiry of the original agreement it was under no obligation to request the plaintiff to stop providing services. The defendant further maintains that as there was no contract for the

extension of the agreement, the principle of estoppel does not come into play. Accordingly the defendant maintains that it is not liable to the plaintiff for any or all losses suffered by the plaintiff.

[9] The plaintiff however maintains that the words 'no commitment' relate to the fact that the services would be provided without any commitment on the part of the government to renew or offer the plaintiff a fresh contract for the NanoTag Program.

[10] The present dispute therefore arises because the plaintiff was not paid for services it rendered during the interim period. The government, in its defence, contends that it has not breached any obligation, because there never existed any obligation to pay the plaintiff for services rendered during the interim period. On the contrary, the government relies on the correspondence between the parties to maintain that the plaintiff was to provide the requisite services free of all charge.

ISSUES

[11] Accordingly the dispute here centres around whether, by reason of the circumstances surrounding the provision of services after the expiry of the original contract and during the interim period:

(a) there was a legally binding agreement, albeit express or implied between the plaintiff and the defendant, to the effect that the plaintiff was to continue providing services to the defendant on terms identical to that under the original agreement, until the completion of negotiations between the plaintiff and the defendant;

(b) if so, whether the plaintiff was entitled to be paid for the services it provided during the interim period;

(c) whether by reason of the conduct of the defendant and the course of dealing between the parties before, particularly after the expiry of the original agreement, the defendant is estopped from denying the subsistence of an agreement to continue to provide services during the interim period and to be paid for such services rendered on terms similar to that under the terms of the original agreement; and

(d) further or alternatively whether the plaintiff is entitled to make claim on a *quantum meruit* basis for the value of goods and services rendered to the defendant during the interim period, for which services the plaintiff had always intended to be remunerated.

THE TRIAL

[12] The trial of this matter took place over a period of two days and three witnesses testified in total. They were:

(a) Tunku Karldej bin Tunku Shamsul Bahrin, PW1 ('PW1') on behalf of the plaintiff;

(b) Dato' Daud bin Tahir, DW1 ('DW1') on behalf of the defendant; and

(c) Datuk Mohd Zain bin Mohd Dom, DW2 ('DW2') on behalf of the defendant.

[13] There was not considerable dispute about the documents produced at trial. Given the voluminous nature of the documents, they were placed in several bundles. Most of the documents, by consent between the parties fell within Part B, namely the maker was dispensed with but the contents remained in dispute, while a few fell within Part C, where both authenticity and admissibility were in issue. In the latter case rulings were made during trial on those particular documents and they were marked as exhibits. In respect of the Part B documents, given that authenticity was not in question, each document was not marked separately as an exhibit.

ISSUES

[14] The issues that fall to be considered in this case are as follows:

(a) whether upon expiry of the original agreement between the plaintiff and the defendant, the net effect of the acts, words and conduct of the parties was such that it may be construed that there subsisted a legally binding agreement between them for the supply of the same services by the plaintiff to the defendant, as that contained in the original agreement, during the tenure of the interim period, ie from 31 March–31 October 2011;

(b) whether by reason of the course of dealing between the parties and their conduct, the defendant is estopped from denying the subsistence of such a legally binding agreement between the parties during the interim period; and

(c) alternatively, if no such legally binding agreement subsisted between the plaintiff and the defendant, whether the plaintiff is entitled to recover reasonable compensation for the services rendered to the defendant during the interim period on the basis of *quantum meruit*.

THE SALIENT FACTUAL BACKGROUND

[15] The salient background facts have been comprehensively set out by the plaintiff in its submissions in tabular form. Learned counsel for the defendant has accepted the same as comprising the salient background chronology, save for selected items. I therefore largely adopt the same below and indicate those facts or events which remain in dispute between the parties.

[16] Between 2005 and early 2006, the plaintiff submitted a proposal pertaining to the NanoTag Programme to address the problem of the unchecked abuse of subsidised diesel, to the defendant. According to the defendant in or around 22 March 2006, a decision was made for the defendant by the Cabinet agreeing to the plaintiff's proposal under a contract to commence from 1 April 2006. The plaintiff puts the defendant to proof of this fact, maintaining that it was never aware of the same. At all material times, in this claim, the Government of Malaysia was represented by the Ministry of Domestic Trade and Consumer Affairs.

[17] The NanoTag Programme is technology which is designed to address the abuse of subsidised diesel through the application of proprietary fuel markers, named 'NanoTag' markers, followed by field enforcement. According to Tunku Karldej bin Tunku Shamsul Bahrin, PW1 ('PW1'), the objective of the technology is to deter and reduce smuggling and the unauthorised usage of subsidised diesel. This has the effect of reducing the government's diesel subsidy bill whilst ensuring that eligible sectors and target groups, as determined by the defendant through the Ministry of Domestic Trade And Consumer Affairs ('the Ministry'), continue to receive subsidies.

[18] The technology behind the NanoTag Programme as may be understood by the layman was described by PW1. He explained that the NanoTag marker concentrate is poured and diluted into diesel that has been predetermined as eligible for subsidy. These markers will remain in the diesel and can be detected at any time utilising the plaintiff's proprietary test kit and testing methodology. For enforcement purposes therefore, this enables the defendant to clearly differentiate between subsidised diesel which is marked unsubsidised diesel which is not marked.

[19] Vide an agreement between the plaintiff and the defendant (through the Ministry) dated 21 September 2006, referred to as the 'original agreement' above, the plaintiff was appointed by the defendant to implement the NanoTag Program for a period of five years commencing from 1 April 2006–31 March 2011. In fact the plaintiff had already begun providing services to the defendant with effect from 1 April 2006 even though the original agreement was only executed some five months later, in or around September 2006.

Under the terms of this agreement the plaintiff was to provide the services of, inter alia:

(a) supplying NanoTag markers;

(b) marking of subsidised diesel with the said NanoTag markers;

(c) inspection of sites; and

(d) field testing and laboratory analysis of diesel samples taken from the sites;

subject to the terms and conditions of the original agreement.

[20] On 10 October 2006 the Control of Supplies (Marking of Scheduled Article) Order 2006 was made to make the possession of subsidised diesel by an ineligible person, illegal. As such with effect from 16 October 2006 when this Order came into force, it became a criminal offence for any unauthorised persons to be in possession or custody or control of any marked subsidised diesel. In this context the NanoTag Proprietary fuel marker MTK-02 supplied by the plaintiff was declared by the Minister as the specified marking with effect from 1 April 2006 to mark subsidised diesel under the 2006 order as *gazetted* by order of the Minister vide Government Gazette GN No 6524 dated 25 March 2011. It has not been revoked to date.

[21] The annual contract sum for the first year of the original agreement was agreed upon between the parties at RM117,387,881.80. The annual contract sum for the second to the fifth years was to be determined using the annual contract sum for the first year of the agreement as a benchmark as provided for in cl 5.2 of the agreement.

[22] Vide letter dated 14 September 2009, the Ministry of Finance wrote to the Secretary General of the Ministry of Domestic Trade, ie Datuk Mohd Zain bin Mohd Dom, DW2, stating, inter alia, that the original agreement would continue in accordance with the original terms, ie until 31 March 2011, whereupon it was to expire with no extension. The Ministry of Finance agreed with the Ministry of Domestic Trade to conclude the annual contract sum for the second to fourth years of the agreement at the price of RM117,387,881.80 pa. As for the fifth year commencing from April 2010 to March 2011, it was stipulated that the scope of implementation of the program would be revised and the annual contract price for the fifth year re-negotiated and submitted to the Ministry of Finance for approval.

[23] Accordingly for the whole period form the second to the fourth year of the agreement, from 1 April 2007–31 March 2010, the defendant agreed to pay and the plaintiff accepted the same sum as the annual contract sum for the first year, ie RM117,387,881.80 per year. For the fifth or last year, the parties

in January 2011 entered into a supplementary agreement which provided that the annual contract sum for the fifth year was fixed at RM113,393,881.

[24] On or about 1 September 2010, about seven months prior to the expiry of the original contract the plaintiff submitted to the defendant, pursuant to cl 4.2 of the original contract, a written notice requesting for an extension of the agreement. A similar application was also forwarded to the Ministry of Finance. The Ministry of Finance replied vide letter dated 8 November 2010 taking note of the plaintiff's application for the renewal of the agreement and advising the plaintiff to forward its application to the Ministry of Domestic Trade for consideration.

[25] On 9 March 2011 the plaintiff provided further detailed costs for the proposed implementation of the NanoTag Program as requested by the defendant for the purposes of procuring a fresh term with the defendant. On 25 March 2011 vide Government Gazette GN No 6524, the Minister's declaration that the NanoTag proprietary fuel marker MTK-02 was the 'specified marking with effect from 1 April 2006 to mark subsidised diesel under the 2006 Order, was *gazetted*. Five days later, on 31 March 2011 the original contract expired in accordance with cl 4.1.

[26] The plaintiff then wrote a letter dated 31 March 2011 to the defendant. It is this letter that comprises the nub of the dispute between the parties. As such it is prudent to set out the salient parts of the letter, as the construction of the same, within the factual matrix of this dispute is relevant for the purposes of ascertaining the true intention of the parties. The letter is addressed to the secretary-general of the Ministry of Domestic Trade, ie DW2 and reads, inter alia, as follows:

> … Teras Kimia Sdn Bhd (TKSB) dimaklumkan bahawa pihak Kementerian Pedagangan Dalam Negeri Koperasi dan Kepenggunaan (KPDNKK) masih belum membuat keputusan mengenai Program NanoTag yang di laksanakan oleh TKSB. Pihak kami juga difahamkan bahawa jika program ini dihentikan pada masa ini, penyelewengan diesel bersubsidi akan berleluasa semula. Oleh itu, kami bersetuju untuk meneruskan pelaksanaan Program NanoTag in tanpa komitmen dari pihak KPDNKK untuk tempoh 2 bulan sehingga 31 hb Mei 2011 …

[27] The letter was received by DW2 on behalf of the defendant. On the copy received by the defendant is DW2's handwriting which he affirmed he had duly minuted. The minutes read as follows: 'Seperti yang telah dibincang, OK jika benar tidak ada komtiment untuk memilih semula Teras Kimia secara automatic and juga tanpa apa-apa bayaran kepada syarikat tersebut'. DW2 testified that these minutes reflected his understanding of the purport of the plaintiff's letter namely that there was no automatic extension of the original contract and that no payment was due to the plaintiff for the continued work

to be undertaken by the plaintiff. However no letter to that effect was issued out to the plaintiff. Neither was any form of acceptance issued by the defendant in response to the plaintiff's letter of 31 March 2011.

[28] Pursuant to the plaintiff's letter of 31 March 2011, DW2 wrote to all the oil companies in Malaysia requesting them to extend their co-operation to the plaintiff with respect to the marking of subsidised diesel at their respective depots until 31 May 2012 notwithstanding the expiry of the original agreement. This was because the KPDNKK was of the opinion that the program was still needed in light of the government continuing to subsidise diesel in the country. Similar letters were also forwarded to all state KPNDKK offices throughout Malaysia.

[29] The plaintiff therefore, from 1 April–31 May 2011 and for the further period from 1 June–31 October 2011, continued to provide services identical to that provided under the original contract to the defendant. In short during the interim period the plaintiff continued to perform its services under the NanoTag Program, including:

(a) the ordering and purchase of substantial quantities of NanoTag markers and sampling equipment from its suppliers, for the purposes of fulfilling the monthly minimum quantity of subsidised diesel to be marked;

(b) the employment of specialists, experts and staff to perform the plaintiff's obligations under the NanoTag Programme in a manner identical to that under the original contract;

(c) attendance at diesel distribution depots and terminals nationwide as specified in Schedule 3 of the original contract, on a daily basis, thereby marking approximately 4.982 litres of diesel fuel;

(d) attendance at sites and premises identified by and upon the request of the relevant authorities and/or enforcement officers of KPDNKK and/or KPDNKK's Federal Territories and/or state offices to conduct inspections of the premises and diesel sampling and to assist in the investigation of reported cases of smuggling, abuse, misuse or illegal possession of subsidised diesel;

(e) testing of samples of diesel fuel nationwide and the conducting of laboratory testing of diesel fuel samples referred to the plaintiff by KPDKNKK for the verification of subsidised diesel at KPDNKK's request; and

(f) assisting KPDNKK in the enforcement and/or prosecution of those suspected of smuggling, abuse, misuse or illegal possession of subsidised

diesel by the preparation and submission of written statements and other evidence at KPDNKK's request for the purposes of enforcement or court proceedings.

[30] A record of the work carried out by the plaintiff during the interim period is borne out by the 'Laporan Pemeriksaan Premis', 'Laporan Penandaan Diesel Bersubsidi' and 'Laporan Kawalseliaan Pematuhan Standard Prestasi'. It is not in dispute that these reports were received by the defendant. Thus the fact that such work was carried out during the interim period is also not in dispute.

[31] Apart from the foregoing the defendant also received monthly summaries of results of the premises inspection operations for each individual state vide the plaintiff's letters to the KPDNKK and to each individual state. The defendant also received from the plaintiff letters enclosing lists of the plaintiff's employees appointed and authorised to carry out the services under the NanoTag Program for the interim period.

[32] It is also relevant that the defendant had, after the expiry of the original agreement, expressly requested for the following specific services of the plaintiff:

(a) the testing and verification of diesel samples which were provided by KPDNKK offices to the plaintiff;

(b) testing and premises inspection reports from the plaintiff for the purposes of investigation and prosecution of cases;

(c) attendance of the plaintiff's officers to provide recorded statements of investigations carried out jointly by the plaintiff and the defendants' staff;

(d) attendance at meetings at the request of KPDNKK state offices in relation to the supply of subsidised diesel; and

(e) oral requests by KPDNKK officers to conduct the testing of samples, attendance at site inspections and meetings and the provision of test reports to KPDNKK officers.

[33] While such work was being carried out by the plaintiff during the interim period, in substance identical to that undertaken by it during the term of the original contract, the parties were actively involved in negotiations for a new contract. Three other companies also tendered for the project, namely SIRIM Bhd, Nanocarb Technology Sdn Bhd and Winpower Corporation (M) Sdn Bhd ('the proposed contractors').

[34] The relevant correspondence between the plaintiff and the defendant during this period discloses inter alia that on 13 April 2011 KPDNKK wrote to

the plaintiff requesting it to submit to KPDNKK the detailed costs of its marking products and test equipment, costs of technology and costs of sampling and staffing. Such information was required to be produced on or before 18 April 2011 for KPDNKK's further action. Similar letters were also issued to the other proposed contractors seeking to procure the new contract.

[35] The plaintiff responded vide letter dated 18 April 2011 providing, inter alia, the quotations sought. Vide letter dated 26 April 2011, the defendant through KPDNKK wrote to the plaintiff inviting it to table its proposals at the Diesel Marking Programme Contractor's Assessment Committee Meeting scheduled for 29 April 2011 to be chaired by the deputy secretary general of KPDNKK. The defendant also requested the plaintiff to submit its cost details for the implementation of its programme. Accordingly the plaintiff submitted its cost details vide email dated 26 April 2011.The defendant testified at trial that similar letters were issued to the other proposed contractors.

[36] Vide email dated 31 May 2011 the plaintiff through KPDNKK requested the plaintiff to provide its cost details for marking 8 billion liters of subsidised diesel and the taking of 30,000 samples. This was followed by a further email from the defendant requesting the plaintiff to table its proposals at the aforesaid Assessment Committee Meeting scheduled for 20 May 2011. The plaintiff vide a letter dated 18 May 2011 proposed, inter alia, further price quotations for the marking of the subsidised fuel.

[37] On 8 June 2011 the defendant through KPDNKK requested the plaintiff to submit samples of its marker products to the Department of Chemistry for testing. This was followed up by a further email dated 13 June 2011 specifying various products to be so submitted to the Department of Chemistry. Similar emails, it is to be understood from the defendant, were issued to the other contractors.

[38] On 14 June 2011 the defendant through KPDNKK requested the plaintiff to attend the Marking of Subsidised Diesel Program Meeting scheduled on 15 June 2011, to be chaired by DW2. Following from this meeting the plaintiff wrote a letter dated 17 June 2011 to DW02 stating, inter alia, as follows:

(a) the contract price for the revised and restructured scope of work under the program was an annual contract sum of RM101,776,719 for the first three years and RM99,995,038 for the final two years;

(b) proposals of alternative technologies that could be employed by the defendant to mark and test subsidised diesels; and

(c) the weaknesses and doubts of employing alternative technology and methods.

[39] The defendant responded to the plaintiff's letter of 17 June 2011 vide its emails of 28 and 30 June 2011, requesting for cost details for the plaintiff's proposals as set out in its letter. The plaintiff duly submitted the cost details sought.

[40] Throughout June and July 2011 there was further correspondence between the parties in relation to the proposed costing put forward by the plaintiff, who was hoping to secure a new contract.

[41] On 16 August 2011 the plaintiff wrote to the defendant through DW2, requesting for interim payment for the services rendered to the defendant for the period from 1 April–31 July 2011. Soon after this vide Government Gazette GN No 23195 the Minister's declaration that the NanoTag proprietary fuel marker supplied by the plaintiff was the specified marking from 16 October 2006 to mark subsidised diesel was *gazetted*.

[42] The plaintiff receiving no response to its letter of 16 August 2011, wrote to the defendant through the Ministry of Finance on 5 September 2011 requesting for interim payment for services rendered for the period from 1 April–31 August 2011. There was no response to this letter either.

[43] On 18 October 2011 the plaintiff wrote to DW2 stating that it took note of the lack of co-operation from KPDNKK's enforcement officers in respect of the joint conduct of inspections on 17 October 2011. Further the plaintiff also specified that it took note that its officers were advised that KPDNKK had directed that all co-operation and joint actions between the plaintiff and the defendant were to cease. The plaintiff requested that the defendant rectify the situation and continue to extend its co-operation so that the programme could continue.

[44] On 21 October 2011 the plaintiff received a letter from the defendant through the Ministry of Finance advising the plaintiff that its application for a fresh contract for the NanoTag Program for a further period of five years had been refused. Further it also advised that the plaintiff's request for interim payment from April 2011 to September 2011 was also refused.

[45] The plaintiff responded immediately on the same day stating, inter alia, that:

(a) after the expiry of the original agreement the plaintiff and the defendant had been negotiating for a new agreement;

(b) since the expiry of the original agreement the plaintiff had agreed to continue implementing the NanoTag Program throughout the negotiation period on the understanding that its services would be

carried on until a new contract was concluded. Further, it specified that it understood that all dealings from the date of expiry of the agreement until the date a new contract is concluded (whether with the plaintiff or otherwise) would be governed by the terms of the original agreement;

(c) the plaintiff was still providing services until the 21 October 2011; and

(d) the plaintiff enclosed its invoices for work done from 1 April–30 September 2011.

[46] The defendant replied through DW2 on 28 October 2011, requesting the plaintiff to discontinue the implementation of the NanoTag Program as the contract between the parties had expired on 31 March 2011.

[47] The plaintiff responded on 8 November 2011 reiterating that although the original agreement had expired the parties had been actively engaged in negotiations from such expiry. Further the plaintiff pointed out that the defendant was aware that from 1 April 2011 the plaintiff continued to provide services identical to that under the original agreement in anticipation of securing a fresh contract and more significantly on the understanding that it would receive payment for such services rendered. The plaintiff expressed its disappointment and ended by stating that the defendant's letter of 28 October 2011 amounted to wrongful termination and reserved its rights to claim for any loss suffered as a consequence.

[48] The defendant responded to this letter through DW2 on 11 November 2011 maintaining that any meetings between the parties was for the purpose of fixing the scope and pricing for a new term of the contract. The plaintiff's services during the interim period would not be paid for as the plaintiff in its letter to the defendant indicated the plaintiff's intention to carry out the program without payment. In this context reference was made to the Ministry of Finance's decision of 21 October 2011.

[49] The plaintiff issued a letter of demand through its solicitors for payment for services rendered during the interim period in the sum of RM66,146,435.60. It then commenced these legal proceedings. This then sets out the full factual matrix of the dealings between the plaintiff and the defendant.

Issue (a): Whether, upon expiry of the original agreement between the plaintiff and the defendant, the net effect of the acts, words and conduct of the parties was such that it may be construed that there subsisted a legally binding agreement between them for the supply of the same services by the plaintiff to the defendant, as that contained in the original agreement, during the tenure of the interim period, ie from 31 March–31 October 2011

[50] It must be made clear at the outset that the plaintiff is not seeking vide

these proceedings, to argue or contend that the original agreement was in any manner renewed or extended for a further period of five years. This issue was specifically put to the parties and the plaintiff confirmed that it is not seeking a declaration that the original agreement was renewed or extended on similar terms for a further period of five years. The dispute here, as set out above, relates to the interim period. In the present context the issue for consideration is whether a legally binding agreement subsisted between the parties during this interim period on terms similar to or identical with the expired original agreement.

THE LAW

[51] Learned counsel for the plaintiff has set out the position in law comprehensively and accurately. I concur with learned counsel for the plaintiff that the question of whether a binding contract subsists between the parties depends, in law, on a consideration of the communications between the parties, both by word or conduct. It then falls to be considered whether such words and conduct, when considered in their entirety on an objective basis, can give rise to a conclusion that the parties had intended to create legal relations, and agreed upon the terms which the law regards as being essential for the formation of legally binding relations.

[52] What however is the position if certain terms of economic or other significance were not finalised? Does a contract still subsist or is the correct conclusion that no contract was in subsistence because of the absence of this salient factor? The case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 3 All ER 1, a decision of the English Supreme Court is instructive. In that case the defendant set the claimant a letter of intent confirming its wish to appoint the claimant to supply automated machines for packaging and product handling in the food industry. Detailed negotiations as to the terms of the contract then took place. The contract formed by the letter of intent expired on 22 March 2005, but the parties agreed to extend it from time to time until 27 May 2005 to allow for the execution of the full contract. The claimant had begun work on the project and continued to do so after expiry of the letter of intent contract. The contract was agreed on terms as at 5 July but never signed. A dispute arose between the parties and one of the issues before the English Supreme Court was whether a contract subsisted between the parties after the expiry of the letter of intent contract. Although the factual matrix does not bear considerable similarity with the present case, the Supreme Court set out the principles to be applied when considering whether a binding contract subsisted between the parties. Lord Clarke SCJ, delivering the decision of the court held, inter alia, as follows:

The general principles are not in doubt. Whether there is a binding contract between the parties, and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.

The problems that have arisen in this case are not uncommon, and fall under two heads. Both heads arise out of the parties agreeing that the work should proceed before the formal written contract was executed in accordance with the parties' common understanding. The first concerns the effect of the parties' understanding (here reflected in cl 48 of the draft written contract) that the contract 'would not become effective until each party has executed a counterpart and exchanged it with the other' — which never occurred. Is that fatal to a conclusion that the work done was covered by a contract? The second frequently arises in such circumstances and is this. Leaving aside the implications of the parties' failure to execute and exchange any agreement in written form, were the parties agreed upon all the terms which they objectively regarded or the law required as essential for the formation of legally binding relations? Here, in particular, this relates to the terms on which the work was being carried out. What, if any, price or remuneration was agreed and what were the rights and obligations of the contractor or supplier?

We agree with Mr Catchpole's submission that, *in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances.* This can be seen from a contrast between the approach of Steyn LJ in the *Percy Trentham* case, which was relied upon by the judge and that of Robert Goff LJ in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, to which the judge was not referred but which was relied upon in and by the Court of Appeal.

These principles apply to all contracts, including both sales contracts and construction contracts and are clearly stated in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, both by Bingham J at first instance and by the Court of Appeal. *In the Pagnan case it was held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms leaving certain subsidiary and legally inessential terms to be decided later.* (Emphasis added.)

[53] Clarke SCJ then went on to consider the difference between the

approaches adopted by Steyn LJ in the *Percy Trentham*'s case and that of Robert Goff J in the *British Steel*'s case and concluded that there was no conflict between the two. This is what he said:

> … Each case depends upon its own facts. We do not understand Steyn LJ to be saying that it follows from the fact that the work was performed that the parties must have entered into a contract. On the other hand, it is plainly a very relevant factor pointing in that direction. Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that is but one. The decision in the *British Steel* case was simply one on the other side of the line. Robert Goff J was struck by the likelihood that parties would agree detailed provisions for matters such as liability for defects and concluded on the facts that no binding agreement had been reached. By contrast in the *Pagnan* case Bingham J and the Court of Appeal reached a different conclusion, albeit in a case of sale not construction …

[54] In the case of *Trentham (G Percy) Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, the central dispute between the parties was whether two valid contracts were concluded between the parties. In essence *Trentham* contended that two separate subcontracts subsisted between the parties while *Archital* denied that the dealings between the parties ever resulted in the conclusion of binding subcontracts. It was ordered that a preliminary issue be tried, namely whether valid subcontracts were made between the parties. At first instance the judge held that two subcontracts validly subsisted. This was upheld by the English Court of Appeal. Steyn LJ in delivering the judgment of the court stated, inter alia, as follows:

> … Before I turn to the facts it is important consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v Metropolitan Railway* (1877) 2 AC 666; *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1974] 1 Lloyd's Rep 534 at 539 col 1; ; [1975] AC 1154 at p 167 D–E; *Gibson v Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executor. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd v Novinex* [1949] 1 KB 628 at p 630.

> The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Collis Ltd v Atomic Power Construction Ltd* [1963] 1 WLR 333.

[55] On the facts of the instant case it will be recalled that on 31 March 2011 the plaintiff wrote to the defendant offering to carry on with the services it provided under the original contract (notwithstanding the expiry of the same) without commitment on the part of the defendant for a period of two months until 31 May 2011. This amounts to an offer. The defendant did not respond to this letter but acquiesced to, and participated in the execution of the further services provided by the plaintiff. Services were rendered for a term of seven months thereafter in total without any objection or demur from the defendant. During this time the parties embarked on a series of negotiations for a fresh contract. In *Chitty on Contracts* (Vol 1, General Principles), (28th Ed), at para 2–025 at p 100, the learned author states as follows:

> When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. *The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both parties, or one of them had reservations not expressed in the correspondence. The court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject matter of the negotiations has actually been rendered.* In one such case a building sub-contract was held to have come into existence, even though agreement had not been reached when the work was begun, because during its progress outstanding matters were resolved by further negotiations; and this contract may then be given retrospective effect to cover work done before its conclusion. (Emphasis added.)

[56] And at para 2–028 at p 102:

> Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement are obviously more difficult to ascertain than were the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all. But sometimes the court can resolve the uncertainty by applying the standard of reasonableness or by reference to another contract (whether between the same parties or between one of

them and a third party), or even to a draft agreement between them which had never matured into a contract. For example in *Brogden v Metropolitan Ry* (1877) 2 App Cas 666 a railway company submitted to a merchant a draft agreement for the supply of coal. He returned it marked 'approved' but also made a number of alterations to it, to which the railway company did not expressly assent; but the company accepted deliveries of coal under the draft agreement for two years. It was held that once the company began to accept these deliveries there was a contract on the terms of the draft agreement.

[57] The foregoing position has been approved by the Malaysian Court of Appeal in *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 where Gopal Sri Ram JCA held that there was in existence a concluded contract despite the want of a duly executed formal agreement (at p 752, para 7 at H):

> … I think there was a concluded contract despite the want of a duly executed formal agreement. Just look at the facts. You have an offer by the defendant. You have an acceptance by the plaintiff. And you have consideration. You have certainty of parties, certainty of price and certainty of the property. And you have the unequivocal acts of part performance by the plaintiff which are referable to an existing contract between the parties (*Steadman v Steadman* [1974] 2 All ER 977).

In Lin *Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 Wylie CJ (Borneo) after a discussion of the authorities said (at p 205):

> All these cases illustrate the length to which a court of equity will go in seeing that an agreement which is partly performed, should be fully carried out by both parties, notwithstanding uncertainty in the terms of the agreement and the lengths to which such a court will go to resolve these uncertainties so that full performance can be ordered.

The acts of part performance in the present case are the payment of the deposit coupled with the RM5,000 meant for the squatters. Based on the authorities there was a concluded contract in this case (see *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327). True that no formal contract of sale and purchase was ever executed. But that does not matter. There can be a concluded contract even where the parties contemplate the execution of a more formal document …

[58] Reference was made with approval to the *Percy Trentham* case and the standard stipulated by Steyn LJ duly approved, namely that 'the governing criterion is the reasonable expectations of honest men' and 'the yardstick is the reasonable expectations of sensible businessmen'.

[59] By way of completion, in relation to this exposition of the law, it is relevant to note that in *Hillas & Co, Ltd v Arcos, Ltd* [1932] All ER Rep 494 Lord Tomlin held, inter alia, as follows:

The problem for a court of construction must always be to balance matters such that, without the violation of essential principles, the dealings of men may as far as possible be treated as effective, and the law may not incur the reproach of being the destroyer of bargains.

APPLYING THE LAW TO THE FACTS OF THE INSTANT CASE

[60] In the instant case the plaintiff contends that a valid contract subsisted during the interim period on terms identical to that of the expired original contract, while the defendant maintains otherwise. The defendant maintains that all services undertaken by the plaintiff after the expiry of the original contract were undertaken at its own behest and voluntarily because no new contract was entered into the parties after the expiry of the original contract. However the defendant does not dispute that the plaintiff did, as a matter of fact render the services it has claimed to have provided.

[61] In short, the defendant maintains that no valid contract subsisted during the interim period because the parties did not enter into a new contract after the expiry of the original contract, notwithstanding negotiations and notwithstanding the performance of services by the plaintiff during that interim period. The absence of a written executed contract between the parties after the expiry of the original contract, in other words, precludes the subsistence of any valid contract during the interim period, notwithstanding the performance of services by the plaintiff. The defendant's contention is that the services of the plaintiff were effectively performed 'free of charge' or at its own volition in the absence of a concluded written contract.

[62] The task before this court therefore is to ascertain whether, on the basis of the correspondence as well as the conduct between the parties, a valid contract did, or did not subsist, during the interim period.

The approach to be adopted by the court has been set out extensively above. It is incumbent upon this court to consider the entirety of the circumstances to ascertain, on an objective basis, whether a contract so subsists. The relevant factors to be taken into consideration in ascertaining this issue are as follows:

(a) on expiry of the original contract, the plaintiff wrote to the defendant vide letter dated 31 March 2011 offering to continue to provide services, 'without commitment' for a further period of two months, which as a matter of fact extended to a term of seven months. PW1, who wrote the letter testified that he meant that the plaintiff's services were rendered during the interim period without any commitment on the part of the defendant to renew or offer a fresh contract to the plaintiff for a further term. DW2 on the other hand, testified that upon receipt of the letter, he understood the words' without commitment' to mean that the plaintiff

would continue to undertake the provision of services 'free of charge'. To this end, he explained that he had minuted the same on his copy of the letter and therefore agreed to accept the provision of services.

It is immediately apparent from a consideration of the law that PW1's and DW2's subjective intentions are not relevant for the purposes of ascertaining whether a contract subsisted. The approach to be undertaken is an objective one. As such I shall decline to take into consideration the subjective intentions of PW1 and DW2, and instead consider the contents of the letter of 31 March 2011 in the context and ambit of the surrounding circumstances then;

(b) at this time, ie during the interim period, the parties were involved in negotiations for a new or fresh contract, for the provision of similar or like services. Other contractors were also invited to submit tenders for this project. Notwithstanding this, it is evident from the series of correspondence between the parties that I have outlined in the salient factual background facts, that negotiations were underway during this time. The offer by the plaintiff vide letter dated 31 March 2011, was therefore made during and in the context of negotiations for entry into a new contract;

(c) the defendant did not respond expressly to the plaintiff's offer contained in the 31 March 2011 letter. It remained silent. However it did not object to, and in fact allowed and actively participated in co-operating with the plaintiff in the provision of its services. The services of the plaintiff are such that they require the participation and co-operation of the defendant's servants and agents. Such co-operation was forthcoming, as is borne out by the fact that at ground level, ie at premises throughout the country, the provision of services by the plaintiff continued and were accepted by the defendant, as if the original contract had not expired. Subsidised diesel continued to be marked on a daily basis, tests were undertaken, prosecutions continued, and the plaintiff received and accepted directives from the defendant's servants and agents as it had done during the course of the original contract. It follows from the foregoing that the only reasonable inference to be drawn is that the defendant accepted the plaintiff's offer for the continued provision of services during the interim period;

(d) such a conclusion is further borne out by the defendant's concession that the plaintiff did, as a matter of fact, perform the services it now seeks remuneration for. In other words, the defendant does not dispute that the plaintiff did in fact undertake the services which it now makes claim for. As such, it follows that the defendant does not dispute that the plaintiff did make an offer and that it accepted the same. However it would appear that the bone of contention arises in respect of the pricing or consideration for the performance of such services. In other words does

the absence of express agreement on a significant factor like pricing warrant the conclusion that no valid contract subsisted? The cases of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* suggests otherwise.

(In this context, the defendant maintains that such services were provided by the plaintiff 'free of charge' or voluntarily in the interests of the nation. The defendant so maintains solely by reason of the words 'without commitment' in the letter of 31 March 2011. However as set out above, the defendant's subjective understanding or intention is irrelevant for the purposes of construing or ascertaining whether a valid contract subsisted. The relevant standard or yardstick is that of the reasonable businessman or sensible and prudent businessman); and

(e) as set out in the *Percy Trentham*'s case, the fact that the transaction or work was performed during the interim period is an important consideration. It is a pivotal factor to be considered in determining whether or not a contract subsists. The fact that the transaction is executed rather than executor is a matter of primary importance. This is because the fact that the services were performed by the plaintiff and accepted by the defendant, makes it unrealistic to argue that there was no intention to enter into legal relations. It further makes it difficult for the defendant to maintain that any such contract is void for uncertainty, when it has accepted the services performed by the plaintiff, and benefited from the same. Specifically the fact that the services were performed and accepted makes it easier to imply a term resolving any uncertainty, or alternatively it makes may be possible to treat the matter of consideration or pricing as inessential.

[63] It is also relevant to consider that the services performed or provided by the plaintiff during the interim period included:

(a) supplying NanoTag to the defendant in sufficient quantity and to mark all the subsidised diesel duly identified to the plaintiff;

(b) supplying at least 50 units of detectors to the defendant and maintaining the detectors;

(c) marking a maximum of ten billion liters of subsidised diesel per annum with the NanoTag (prorated for the interim period);

(d) taking at least 1500 samples per month to determine the presence of NanoTag;

(e) providing laboratory analysis of samples of diesel taken from the premises to confirm the presence of NanoTag; and

(f) providing assistance to detect the use of subsidised diesel by persons not identified by the defendant as eligible to use or possess any subsidised diesel.

These services were identical with that expected to be provided under the original agreement. The fact that these services were performed during the interim period is not in dispute and borne out inter alia by the various reports provided to the defendant as evidence of the plaintiff's marking and other activities;

(g) the fact that the parties did not enter into a fresh contract subsequently, after the interim period, does not detract, to my mind, from the subsistence of a contract during the interim period. What is relevant is the fact that services were performed by the plaintiff and accepted by the defendant, on terms in substance identical to that under the original contract, during a period when negotiations were ongoing. Applying the standards of the reasonable, prudent businessman it follows that the plaintiff would, of necessity, expect to be remunerated for the not insignificant services it provided nationwide. Given that the annual contract sum was in the region of RM113m odd, it is inconceivable that such services would be provided absolutely free without an express agreement to that effect. No prudent or sensible businessman would or could be expected, in the context of the present factual matrix to have agreed to such an arrangement. Such a voluntary arrangement would have to have been expressed in the clearest of terms, expressly waiving or excluding any remuneration or payment whatsoever. This becomes even clearer when the nature of the plaintiff's services are considered. The plaintiff's services require, inter alia, the production of markers, the employment of personnel and specialised consultants all of which requires the incurring of considerable costs. These are costs which the plaintiff has to bear in order to make available the services to the defendant. If, as the defendant contends, such services were to be provided at no charge, a prudent and commercial businessman would have expressly provided so. In the absence of any such clear waiver of charge, it is difficult to imply into a commercial contract of this magnitude that the executed services were agreed between the parties to be conducted entirely without any fee; and

(h) a further relevant factor is that prior the execution of the original contract, the plaintiff had similarly supplied services to the defendant in the absence of a formal agreement. The plaintiff was remunerated subsequently for the provision of these services, when the original contract was executed. It was not therefore unreasonable for the plaintiff to understand from the entirety of the circumstances, namely the acceptance of continued services on an identical basis, coupled with the lack of objection or protest with the continued provision of services, and the on-going negotiations between the parties that there was in place a

contract for the continued provision of services on terms identical to that under the original contract. There was a precedent to justify the plaintiff so concluding.

[64] For the foregoing reasons, it appears to this court that there was, during the interim period a valid contract subsisting between the plaintiff and the defendant on terms substantively similar to that of the original contract. As stated above, I so conclude because of negotiations between the parties after the expiry of the original contract, the offer of, and acceptance of services identical to that contained in the original contract for a term of seven months. There was no demur or objection or protest from the defendant as the execution of the contract. In fact the defendant participated and co-operated in the execution of the same. Even after the plaintiff issued its first invoice at the end of July 2011, there was no protest or objection from the defendant to the effect that as far as it was concerned the services were being performed gratis. At no time did the defendant communicate to the plaintiff or any third party until the trial of this matter that the services of the plaintiff were being performed for no payment. In any event the defendant's subjective understanding of the same, as testified by DW2, is not relevant for the purposes of ascertaining whether a contract subsisted between the parties. The fact that there no pricing was agreed between the parties does not to my mind render the contract void because the cost of providing the services may be implied into the contract that subsisted between them. Such a term may be implied because of the terms set out in the original contract. As the services provided by the plaintiff were identical in nature to that in the original contract it follows that the remuneration should be the same, and that such a term may be implied. Alternatively the pricing may be considered as a term, the determination of which the parties considered inessential, and which does not preclude a contract from coming into existence. The issue of the pricing may then be computed on a *quantum meruit* basis.

[65] I am unable to accept the defendant's stance which effectively amounts to a contention either that no contract subsisted or that a contract subsisted whereby the plaintiff agreed to provide its services to the defendant on a 'without charge' or free basis. The former position has been discussed exhaustively above. As for the latter contention, the suggestion that the words 'without commitment' mean without payment is entirely untenable because those words do not carry such a meaning. The word 'commitment' means, inter alia, 'obligation'. The fact that the plaintiff undertook to provide the services 'without obligation' does not translate to an agreement to undertake the word with no payment whatsoever. It would be a perverse construction of the entire letter of 31 March 2011 to conclude that the plaintiff was offering its services for free. It is an entirely untenable construction to adopt.

[66] There was moreover no response or communication from the defendant stipulating that it was accepting the plaintiff's services entirely gratis and thanking them for the same. The fact that DW2 testified that he minuted the fact that these services were being performed free, is of little relevance. It may well have been different if the defendant had responded to that effect. In the absence of remuneration it is unlikely that the plaintiff would have continued to provide its services.

[67] At this juncture it is also relevant to address the issue of the negotiations that continued upon the expiry of the original contract for the procurement of a fresh contract by the plaintiff. It is not in dispute that other parties also tendered for the fresh contract. The fact that they did so does not negate the fact that the plaintiff and the defendant were negotiating for the award of a fresh contract in relation to the auditing of subsidised fuel, albeit under the NanoTag Program or the VisioTag Program. However both DW1 and DW2 maintained in their witness statements that no negotiations were conducted between the plaintiff and the defendant for the extension or renewal of the original contract, due to the decision of the Ministry of Finance that the original contract was not to be extended vide their letter of 14 September 2009. The plaintiff on the other hand maintains that during the interim period the parties were negotiating for a renewal of the contract.

[68] This appears to me to be a matter of semantics. It is evident from the series of correspondence I have referred to at the outset, that there were as a matter of fact letters and meetings between the plaintiff and the defendant pertaining to a proposed new contract. Notwithstanding the letter from the Ministry of Finance dated 14 September 2009 maintaining that the original contract was not to be renewed, the Ministry of Finance did write to the plaintiff on 8 November 2010 referring to the plaintiff's application for a renewal, advising it to forward the same to the KPDNKK. There was no outright rejection of the plaintiff's application at that stage. DW2 maintained that there were no discussions or negotiations to renew the original contract. But it is clear that there were negotiations in place in relation to the award of a fresh contract, albeit to the plaintiff or one of the other parties who tendered for the project. As such there were ongoing negotiations at all material times, and I so find, between the plaintiff and the defendant. Whether it was for an extension of the original contract or for the award of a fresh contract is not crucial, as the negotiations still related to the marking of subsidised fuel.

[69] The fact that negotiations did in fact take place is borne out by the fact that DW1 chaired a meeting on 15 June 2011 in which the plaintiff's scope and price proposals for a fresh term/agreement for the marking of subsidised fuel were discussed. DW1 admitted this. As such the somewhat artificial delineation between negotiations for the renewal of the original contract and

negotiations for a fresh contract do not and cannot detract from the fact that the parties continued to negotiate, during the interim period for a fresh contract for the marking of subsidised diesel.

[70] It is also relevant that in its defence the defendant concedes that negotiations did take place between itself and the plaintiff for a renewal or a fresh contract but that the same failed: — '… Defendan selanjutnya menyatakan bahawa Defendan telah berunding dengan pihak Plaintif dengan niat yang baik untuk tujuan melanjutkan Perjanjian tersebut namun ia telah gagal'. (At para 5(v)).

[71] And in the statement of agreed facts the parties recorded at para 9 that: 'Selepas itu, Plaintif dan Defendan telah memulakan dan terlibat dalam perundingan-perundingan dengan tujuan melanjutkan Perjanjian tersebut bagi satu tempoh lanjutan lima (5) tahun'.

As such it is clear that the parties did enter into negotiations after the expiry of the original contract for a fresh term. Whether such negotiations are labelled as being negotiations for the renewal of the agreement or for a fresh agreement does not detract from the fact that the parties were negotiating for a new contract for the same purpose namely the marking of subsidised fuel.

[72] On a consideration of the totality of matters, including the defendant's contentions and submissions, it appears to this court that a contract did as a matter of fact subsist between the parties during the interim period. The terms of the contract were the provision of services by the plaintiff on terms identical to that under the original contract, for a consideration similar to that under the original contract, and for a term encompassing the period of negotiation or until entry into a new contract, albeit with the plaintiff or any other third party.

Issue (b): Whether by reason of the course of dealing between the parties and their conduct, the defendant is estopped from denying the subsistence of such a legally binding agreement between the parties during the interim period

[73] The doctrine of estoppel is relevant in the instant case as a mode of ascertaining whether such a legally binding agreement subsisted between the parties during the interim period. As stated previously it is evident from a consideration of the defendant's conduct that it accepted and received the benefit of the plaintiff's services under the NanoTag Program without any demur, objection or protest. On the contrary, the defendant actively participated and co-operated in the services and requested for particular services to be performed by the plaintiff during the interim period. This is not in dispute.

[74] In this context the defendant was at all material times represented by KPDNKK, more particularly the Secretary-General of KPDNKK, ie DW2 in respect of its dealings with the plaintiff. All the officers at state and federal level liaised with the plaintiff for the provision of services, and to this extent, represented the KPDNKK.

[75] KPDNKK was continually appraised of all the services provided by the plaintiff through its reports, including the 'Laporan Pemeriksaan Premis, Laporan Penandaan Diesel Bersubsidi' *Laporan Kawalseliaan Pematuhan Standard Prestasi*, summaries of the results of premises inspection operations for each individual state, lists of employees appointed and authorised to carry out services under the NanoTag Program, all of which were produced in court and which adhered to the key performance indicators set out in Schedule 4 to the original agreement. DW2 expressly admitted during cross-examination that he was aware of the services provided by the plaintiff at least until August 2011.

[76] Notwithstanding this DW2 at no time requested or notified the plaintiff to cease providing these services. Nor was any direction given to the defendant's employees or officers to stop co-operating with the plaintiff in respect of the services provided. Therefore the defendant with full knowledge of the services provided by the plaintiff, accepted the same and continued to allow the plaintiff to supply services without any objection and/or protest.

[77] Secondly, the provision and acceptance of these services was done in the context of the background that the parties were actively negotiating a fresh contract. The plaintiff hoped to procure a fresh term for the NanoTag Program or the alternative VisioTag Program from the defendant.

[78] It follows from the foregoing that the plaintiff, relying on the defendant's acceptance of its services, executed the same, anticipating at all material times that it would be paid for such services. The plaintiff relied upon the acceptance of its offer by the defendant, as borne out by the defendant's conduct, to act to its own detriment. The plaintiff provided services at significant costs to itself to the defendant, understanding at all material times that as the services it provided were identical to that under the original contract, it would be remunerated on a basis commensurate with, if not identical to, the original contract. The defendant did nothing to dispel this representation nor to reject the services so provided. If indeed the defendant was of the view that the services were being provided free of charge, when there was nothing in the letter of 31 March 2011 which would warrant such a construction, it should have responded to the plaintiff's offer, rejecting the same, or clarifying that it would accept such services on condition that they

were provided gratis. This the defendant chose not to do. It made no communication of this crucial factor to the plaintiff.

[79] Even when the plaintiff issued its first invoice for services rendered between March and July 2011, the defendant made no attempt to clarify the position. Neither did it do so when the second invoice up to September 2011 was issued. It merely instructed its personnel to cease working with the plaintiff in any manner whatsoever.

[80] In these circumstances it appears clear to this court that the defendant is estopped from denying that a legally binding contract came into play in during the interim period, as may be construed from the correspondence between the parties and more significantly, their conduct.

[81] In this context, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331 is relevant:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v Alt* (1878) 8 Ch D 286 at p 314:
>
> > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

[82] All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation … that it would be unconscionable for the representor thereafter to enforce his strict legal rights' (per Robert Goff J in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at p 105:

> … the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. All that need be shown is that in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights. Per Gopal Sri Ram JCA (as he then was) at pp 344–348.

[83] Even applying the more stringent or conservative test (which Gopal Sri Ram JCA stated was not an essential ingredient to invoke the doctrine), it follows in the instant case that the plaintiff did in fact act to its detriment in reliance upon the defendant's elegant silence. Estoppel does therefore come into play to preclude the defendant from denying the existence of a contract during the interim period.

[84] In the English Court of Appeal case of *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 Denning MR held as follows:

> … Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete: see *Brogden v Metropolitan Railway* (1877) 2 App Cas 66 at 682 per Lord Hatherley …
>
> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.
>
> To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the conventional basis on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the parties …
>
> …
>
> …
>
> Conclusion
>
> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration and so forth. All these can now be seen to merge into one general

principle short of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands …

[85] The general principle set out above applies to the instant case. Both the plaintiff and the defendant proceeded during the interim period on the basis of the provision of services by the plaintiff on terms identical with that under the original contract. Their dealings were all conducted on that basis during the interim period. On that basis the plaintiff sought to recover payment due to it for the services so provided. It would be untenable for the defendant to accept those services but yet maintain that they should be provided free of charge. That would constitute a considerable departure from the course of dealing between the parties. It is equally untenable for the defendant to maintain that his acceptance of those services was on condition that they were provided without any consideration or gratis, particularly when no communication of such a severe condition was communicated to the plaintiff. The term relating to pricing or cost underscores the entire bargain and the execution of the services, as discussed earlier goes a long way towards establishing the subsistence of a contract.

[86] In conclusion therefore it appears to this court that the defendant is estopped from denying its liability to remunerate the plaintiff on terms similar to or identical with that envisaged under the original contract, for work done, ie services provided during the interim period.

[87] In relation to issues (a) and (b) it remains to be made clear that as it has been concluded that a contract subsisted between the parties during the interim period, the plaintiff is entitled to be remunerated for the work done during this period. As stated earlier it is not in dispute that the work was performed. There have been no complaints about the work done or services provided either. What then is the compensation or consideration that is due to the plaintiff for the interim period. As it has been concluded that:

(a) a contract did in fact subsist on terms identical to that of the expired original contract; and that

(b) services were performed in accordance with the expired original contract

the plaintiff is entitled to be paid on terms similar to, if not identical with the original contract. The plaintiff has issued invoices on terms similar to that under the expired original contract for a sum of RM9,449,490.08 per month for seven months, which is fixed by reference to the fifth year annual contract

price (which in turn was extensive negotiated between the parties) is a fair and reasonable term to be imputed for the costs of the plaintiff's services. This totals RM66,146,435.60 as prayed for by the plaintiff in the statement of claim. The plaintiff is entitled to payment of this sum from the defendant.

Issue (c): Alternatively, if no such legally binding agreement subsisted between the plaintiff and the defendant, whether the plaintiff is entitled to recover reasonable compensation for the services rendered to the defendant during the interim period on the basis of quantum meruit

[88] This issue falls for consideration by way of an alternative to issues (a) and (b). If I am incorrect in concluding that a valid contract subsisted during the interim period, then the plaintiff alternatively seeks for compensation on a *quantum meruit* basis for work done and services performed during the interim period.

[89] In this context, s 71 of the Contracts Act 1950 provides a statutory right to compensation based on *quantum meruit*:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered.

[90] Learned counsel for the plaintiff relies, in this context, on the Privy Council decision of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 where it was held (at p 120 RHC at G):

> It has been common ground before Their Lordships that four conditions must be satisfied to establish a claim under s 71.
>
> The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful;
>
> (2) must be done for another person;
>
> (3) must not be intended to be done gratuitously;
>
> (4) must be such that the other person enjoys the benefit of the act or the delivery.
>
> In Their Lordships' judgment these matters must be answered at the time that the act is done or the thing delivered and this, Their Lordships think is of fundamental importance.

[91] When the foregoing is applied to the facts of the instant case it is evident that the doing of the act, namely the provision of services:

(a) was lawful;

(b) was done for the defendant by the plaintiff;

(c) was done gratuitously. In this context I have previously made a finding that the services were not provided gratuitously. The words 'without commitment' I found are incapable of carrying the meaning of without charge or free; and

(d) were such that the defendant enjoyed the benefit of the services.

[92] It follows from the foregoing that as the four conditions necessary to fall within the ambit of s 71 are fulfilled. Accordingly it follows that the plaintiff is entitled to compensation from the defendant for the services provided.

QUANTUM MERUIT — THE LAW

[93] In *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, Robert Goff J held:

> … In my judgment the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter — as anticipated — a contract was entered into. The work done as requested will be treated as having been performed under that contract; *if, contrary to their expectation, no contract was entered into. Then the performance of the work is not referable to any contract of which the terms can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution.* (Emphasis added.)

[94] In the Court of Appeal decision of *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546 the application of the principle of *quantum meruit* was summarised thus:

> … There may be a quantum meruit claim in the following situations:
>
> (b) when no price is fixed (thus, if the contractor does work under a contract express or implied and no price is fixed by the contract, the contractor is entitled to be paid a reasonable sum for his labour and the materials supplied …);
>
> (c) in a quasi-contract situation (a classic example would be when work is carried out while negotiations as to the terms of the contract are

A proceeding but agreement is not reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out …;

(d) when work is performed outside a contract (thus, in a situation where there is a contract for specified work but the contractor does work outside the contract at the employer's request the contractor is entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract …

[95] The facts of the instant case would fall within (b) or (c) above. Accordingly the plaintiff is entitled to compensation for the services it provided to the defendant during the interim period.

[96] This begs the question, what is the quantum of reasonable compensation to be paid to the plaintiff for the work done? I accept learned counsel for the plaintiff's submission in this context that the contract price as provided in the original contract and the supplementary agreement is relevant in ascertaining the quantum of compensation to be paid as it is evidence of the value the parties attributed to the services provided by the plaintiff during the period immediately preceding the interim period. In fact the services were provided seamlessly immediately prior to and straight after the expiry of the original contract without break. This therefore provides a guide to the reasonableness of the remuneration sought by the plaintiff. The plaintiff has premised its claim for work done during the interim period on the rates and quantum negotiated and agreed upon by the parties for the fifth year of the original contract as provided for in the supplementary agreement.

[97] The case of *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546 is also authority for the contention that the quantum of reasonable compensation is usually calculated by reference to the value of the services:

[44] It must be borne in mind that when the appellant contractor is seeking a quantum meruit it is seeking not a precise sum of money nor a sum representing the general damages incurred by the appellant contractor as a result of some wrongful act on the part of the respondent employer. Rather the appellant contractor is seeking a sum that will provide the appellant contractor with the value of what the appellant contractor has done for the respondent employer. And this is usually calculated by reference to the market price or value of the services …

[45] It goes without saying that a quantum meruit claim may be contractual as in the case of *J & J Penner Construction Ltd v Cringan* [1994] 93 Man R (2d) 252 (QB) where the whole scenario was governed by a contract between the parties but they had not fixed the price for the services rendered by the plaintiffs there …

[48] In *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932, an English case, the facts may be stated as follows. The plaintiffs there rendered services to the defendant at the latter's request in anticipation of a building contract that failed to materialise. When the plaintiffs there sued for payment for the services rendered the defendant argued that it was the common expectation of the parties that a contract would be entered into between them and that the plaintiff's services would be rewarded by the profits of the contract. The defendant denied vehemently that there was any implied promise to pay for the services. The defendant argued that any quantum meruit claim was necessarily contractual and that any such claim was negated by the fact that the parties had an express contract in mind which made it impossible to imply otherwise. This argument was rejected by the court. *The court explained that quantum meruit, though contractual in origin, had given rise to another form of action founded upon what was known, in 1957 when the case was being determined, as quasi-contract. In quasi-contractual instances of the application of quantum meruit, the court looked at the facts and then ascertained from them whether or not a promise to pay should be implied, irrespective of the actual views or intention of the parties at the time when the work was done and the services rendered.* (Emphasis added.)

[98] It follows from the foregoing that notwithstanding the intention or views of the defendant, and given that there is no dispute that the subject services were in fact provided by the plaintiff for the defendant's benefit, a promise to pay is to be implied enabling the plaintiff to receive compensation for the services provided. Again the mode of computing reasonable compensation is best answered by considering the quantum paid by the defendant to the plaintiff after negotiation, for the final or fifth year of contract, as explained above. The plaintiff has in fact premised its claim for quantum meruit on this basis, namely the sum of RM9,449,490.08 per month as charged in its Invoices Nos 0066,0067, 0068,0069, 0070,0071 and 0072, totalling RM66,146,435.60. This appears to this court to be a fair and reasonable compensation for the services rendered to the defendant.

THE PERFORMANCE BOND

[99] Finally the plaintiff makes claim for recovery of the performance bond in the sum of RM5,869,394.09 it provided to the defendant pursuant to cl 18.1 of the expired original contract. In accordance with that clause, the performance bond comprising 5% of the annual contract price was to be released immediately to the plaintiff on 30 March 2012, ie 12 months after expiry of the original contract. As this date has passed, the plaintiff is entitled to a refund of the said performance bond.

[100] In all the circumstances of the case, I am satisfied that the plaintiff has

proved its case on a balance of probabilities and is entitled to relief sought for in its claim. For clarity it is specified that the defendant is to pay the plaintiff the following sums in accordance with prayers (a), (b), (h) and (i) of the statement of claim, namely:

(a) the sum of RM66,146,435.60 for services rendered to the defendant during the interim period;

(b) the sum of RM5,869,394.09 being the refund of the security provided by the plaintiff to the defendant under the expired original agreement;

(c) interest on the sum in (a) above at the rate of 4% from the date of judgment until the date of realisation; and

(d) costs in the sum of RM45,000.

Order accordingly.

Reported by Kanesh Sundrum